

**FINDING OF EMERGENCY:** Pursuant to section 11346.1 of the Government Code, the Department of Toxic Substances Control (DTSC) finds that the immediate adoption of the attached regulations for procurement of Architectural and Engineering (A&E) contracts is necessary for the immediate preservation of the public health and safety and general welfare. These regulations will describe the process for selecting A&E contractors.

**Emergency Basis:** DTSC's primary mission is to protect public health and the environment from uncontrolled releases of hazardous materials, hazardous substances, hazardous wastes and waste constituents. In order to carry out this mission, DTSC needs to enter into A&E contracts to obtain professional services to conduct activities from initial investigation through the design phases of a project and construction project management oversight when the cleanup is implemented.

DTSC has been using contractors to assist in the investigation, assessment, and implementation of cleanup actions at State of California (State) funded projects for more than 14 years. These site investigation zone contracts are commonly referred to as "zone contracts" because the contractor primarily provides services for an area of the State that corresponds to DTSC's field offices. These contracts were competitively bid as "consulting services contracts" and used as Master Agreements accessed by the issuance of individual task orders. Recently, the Department of General Services' (DGS) legal office verbally informed DTSC that the "zone contracts" include services that fall within the definition of A&E services which are subject to the procurement requirements set forth in chapter 10 (commencing with section 4525) of division 5 of title 1 of the Government Code.

However, in order for DTSC to engage the professional service of private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firm, existing law (Government Code section 4526), obligates a State agency to adopt regulations. This proposed emergency rulemaking sets forth certain specified procedures if the contract amount is \$1 million or more to assure that the services are engaged on the basis of demonstrated competence for the type of service to be performed and that the service is provided at a fair and reasonable price.

**AUTHORITY AND REFERENCE:** These regulations are being adopted under the following authorities:

1. Government Code section 4526. This section requires State agencies to adopt regulations in order to implement the procurement procedures for A&E contracts required under chapter 10 (commencing with section 4525) of division 5 of title 1 of the Government Code.

2. Government Code section 87100. This section states that no public official will use his/her position to influence a governmental decision in which the person knows or has reason to know he/she has a financial interest.
3. Chapter 6.5 of the Health and Safety Code section 25150. This section directs DTSC to adopt standards for the management of hazardous wastes.
4. Chapter 6.8 of the Health and Safety Code section 25351.5. This section directs DTSC to adopt regulations for the cleanup of hazardous substances releases and procedures governing the expenditure of and accounting procedures for moneys allocated to the State.
5. Public Contract Code section 6106. This section requires any State agency or department, which is subject to this code, to follow the process established by this section for negotiating fees and executing a contract for professional consulting services of a private architectural, engineering, land surveying, environmental, or construction project management firm.

**THESE REGULATIONS IMPLEMENT, INTERPRET, OR MAKE SPECIFIC THE FOLLOWING:**

1. Chapter 10 (commencing with section 4525) of division 5 of title 1 of the Government Code. This chapter mandates the implementation and use of a "pre-qualified list" for procurement of A&E services by a State agency. This procurement method is significantly different from the bidding and/or proposal evaluation process required for procurement of other personal and consulting services.
2. Section 4526 of the Government Code. This section requires State agencies to adopt regulations in order to implement the procedures for A&E contracts.
3. Section 4527 of the Government Code. This section requires DTSC to take specified actions in publishing statewide announcements, evaluating qualifications, and performance data, in accordance with this section when selecting a qualified contractor/firm.
4. Section 4528 of the Government Code. This section requires DTSC to follow these provisions when negotiating an A&E contract.
5. Section 4529.5 of the Government Code. This section requires any individual or firm proposing to provide construction management services to provide evidence that it has the necessary expertise and experience to complete the project.

6. Section 25354.5 of the Health and Safety Code. This section requires DTSC to take removal actions, as necessary, with respect to any hazardous substance that is related to the manufacture of an illegally controlled substance. Specifically, it authorizes DTSC to expend funds and procure services to secure all removal actions required by the statute.
7. Sections 25355 and 25355.5 of the Health and Safety Code. Section 25355(b) authorizes the Director of DTSC (the Director) to initiate removal or remedial actions for hazardous substances pursuant to chapter 6.8 of division 20 of the Health and Safety Code. Section 25355.5 expressly authorizes the expenditure of State funds for conducting removal and remedial actions of hazardous substances on any site subject to specified procedures, findings, and determinations.
8. Section 25355.6 of the Health and Safety Code. This section authorizes DTSC to expend money for removal or remedial actions, subject to specified procedures, findings and determinations, at a site referred to DTSC by the State Water Resources Control Board.
9. Section 25355.7 of the Health and Safety Code. This section requires DTSC to establish policies and procedures for taking removal or remedial actions at hazardous substances release site.
10. Section 25358.3 of the Health and Safety Code. This section authorizes the Director to take or contract for any necessary removal action whenever the Director determines that there may be an imminent or substantial endangerment to the public health or welfare, or to the environment, because of a release, or a threatened release, of a hazardous substance.
11. Section 25358.5 of the Health and Safety Code. This section provides DTSC with exemptions from State contract requirements under certain specified conditions.
12. Section 25358.6.1 of the Health and Safety Code. This section authorizes DTSC to advertise and award contracts for A&E services. It also establishes a process for advertising and awarding A&E contracts.
13. Section 25200.10 of the Health and Safety Code. This section directs DTSC to require corrective action for all releases of hazardous wastes or constituents from solid waste management units or hazardous waste management units at a facility engaged in hazardous waste management.

14. Section 10105 of the Public Contract Code. This section defines “project” for purposes of the State Contract Act.

**INFORMATIVE DIGEST:** The proposed emergency regulations establish the applicable criteria and procedures for procurement, by DTSC, of A&E services related to response actions at hazardous substance sites and corrective actions at hazardous waste facilities. These regulations will only permit the selection of A&E contractors on a site-specific basis and describe the process for selecting A&E firms. The process applies to projects that require A&E services in excess of \$1 million and requires the Director to advertise the proposed contract in the *State Contracts Register* or through electronic media maintained by the appropriate professional and trade organizations. The projects would most likely be at State orphan sites, which are sites where the persons or entities responsible for contamination are defunct or financially insolvent or cannot be identified or located and the sites are being cleaned up by the State. The regulations authorize the Director to establish selection and ranking criteria based on a number of factors, including ability to do the work and reliability. The next steps in the contracting process include establishing a firm cost estimate for the work, followed by negotiations with the most qualified and cost effective firm. If negotiations with that firm are unsuccessful, DTSC would initiate negotiations with the next most qualified applicant on the list. Exemptions from this process are allowed for emergencies. Contracts can be amended to reflect changes in the amount of work, and contracts can be awarded in phases to use the most qualified firms for different portions of the work.

**THE PROPOSED REGULATIONS:** The proposed regulations would create chapter 45.5, article 1, sections 67900.1, 67900.2, 67900.3, 67900.4, 67900.5, 67900.6, 67900.7, 67900.8, 67900.9, 67900.10, 67900.11, and 67900.12 of division 4.5, title 22, California Code of Regulations. The proposed emergency regulations are needed to allow DTSC to continue to investigate, evaluate remedial alternatives and design the final remedies for State orphan sites.

These regulations are necessary for several reasons. Most importantly, these regulations are immediately necessary to continue the ongoing work concerning State funded cleanups. In 1980, the United States Congress passed the Comprehensive Environmental Response Compensation and Liability Act, giving the United States Environmental Protection Agency the authority and responsibility to respond to releases and threatened releases of hazardous substances. In 1981, the California Legislature enacted the Carpenter-Presley-Tanner Hazardous Substances Account Act (State Superfund), chapter 6.8 of the Health and Safety Code. Under the State Superfund, DTSC is authorized and required to protect public health and the environment from the harmful effects of releases and potential releases of hazardous substances.

DTSC is responsible for the cleanup of hazardous materials, hazardous wastes/constituents, or hazardous substances that pose or may pose a threat to public health or the environment. These regulations would establish procedures for procuring A&E contracts necessary for corrective actions under chapter 6.5 and response actions under chapter 6.8 of the Health and Safety Code.

The Legislature has appropriated approximately \$8 million per year for DTSC to expend on remediating State orphan sites. DTSC will not be able to fulfill this obligation and risks losing the appropriation in future years if these regulations are not adopted. In addition, DTSC has used its ability to “encourage” a responsible party (RP) to remediate a site, thereby protecting the environment and public health and safety, by threatening to do the remediation and then pursuing cost recovery from the RP. Without A&E contracting ability, this is a hollow threat.

**The California Environmental Quality Act (CEQA) :** CEQA (Public Resources Code section 21000 et seq.) applies to discretionary projects carried out or approved by public agencies. A project is defined as “...an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...” (Public Resources Code section 21065). These proposed regulations would establish internal procedures to be used by DTSC in selecting contractors based on their availability, ability to work, and cost. DTSC has been selecting and hiring contractors to do this type of work for 14 years. These regulations will result in a continuation of the contracting process, but will use different procedural steps. DTSC has determined that the changed contracting procedures will not have a significant effect on the environment. (See California Code of Regulations, title 14, section 15061 (b)(3).) Therefore, this project is exempt from CEQA requirements.

**FISCAL IMPACT ESTIMATES:** If these regulations are not adopted, all contract work for DTSC’s A&E activities will have to go through the DGS, resulting in contract delays and delays in accomplishing the cleanup work. These delays could result in significant and prolonged threats to public health and the environment. This may also result in costlier site remediation actions if hazardous substance releases are allowed to continue without mitigation efforts because they continue to spread and impact soil, groundwater, or air and the public health.

**MANDATES ON LOCAL AGENCIES AND SCHOOL DISTRICTS:** DTSC has determined that there is no mandate on local agencies and school districts because the proposed regulations will not place a new legal burden on local agencies or school districts.

**ESTIMATE OF POTENTIAL COST OR SAVINGS SUBJECT TO REIMBURSEMENT PURSUANT TO PART 7 (COMMENCING WITH SECTION 17500) OF DIVISION 4 OF**

**THE GOVERNMENT CODE AND OTHER NONDISCRETIONARY COSTS OR SAVINGS TO LOCAL AGENCIES:** None.

**POTENTIAL IMPACT ON STATE AGENCIES AND STATE/FEDERAL FUNDS:** None.

**DETAILED DISCUSSION:**

**NEW CHAPTER 45.5:** This chapter establishes the applicable criteria and procedures to be used by DTSC for the procurement of A&E services related to response actions at hazardous substances sites and corrective actions at hazardous waste facilities. A short explanation of the standards of chapter 45.5 follows:

**Article 1:** This article sets general rules establishing the selection process for private architectural and engineering firms for sites or facilities.

**Section 67900.1:** This section sets forth the purpose and scope of this article, and is based on the statutory authority in Government Code section 4526.

**Section 67900.2:** This section sets forth definitions specific to procurement of A&E contracts. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.3:** This section establishes the procedures for announcing a project requiring A&E services. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.4:** This section establishes the criteria for selecting A&E services. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.5:** This section establishes the selection process for architects, engineers or land surveyors. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.6:** This section requires the preparation of a cost estimate of the services being requested. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.7:** This section sets forth the basis for abandoning and reevaluating the State's cost estimate. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.8:** This section states that DTSC will negotiate a contract with the best qualified firm and sets forth the process for terminating negotiations and undertaking negotiations with another firm. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.9:** This section sets forth provisions for the State when making changes in the scope of a project during the course of performing the contract and provides for adjusting the firm's compensation pursuant to mutual written consent. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.10:** This section sets forth the procedures for having the project performed in phases. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.11:** This section describes the process for soliciting the involvement of small businesses in the procurement process. This section is based on the statutory authority in Government Code section 4526.

**Section 67900.12:** This section prohibits unlawful activity and activities that would result in a conflict of interest.